SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I. The District's Court's Explicit Findings of Fact Cannot Be Set Aside by Reason of Anything in the Government's Unwarranted Attack upon the Trial Judge.

A. Apparently, on the theory that the only course open to the Government in a case weak on both the law and the facts is abuse of the court below, the Government launches an attack on the tria' judge (U. S. Br. 14-20) as vicious as it is unwarranted. Disregarding the obvious evasiveness and even hostility of the Government's witnesses, which would have taxed beyond limit the patience of any jurist, the Government, by this unwarranted attack upon the trial judge, seeks to lay the groundwork for an assault upon his specific and explicit findings of fact. Passing the question of professional proprieties involved in that course, it is plain that the record shows no foundation for the

Government's strictures and overwhelmingly establishes that the district court's findings of fact are fully sustained by the evidence.

B. At the outset, it is important to note the sequence of events at the trial.

The first witness called by the petitioners, plaintiffs below, was Kinnaman, the federal range manager (R. 62). He early showed himself to be an evasive witness (R. 73-74, 75-76). However, he testified without incident until it developed that he had instituted the destruction of petitioners' horses—the subject matter of the present case—during the pendency of the *Hosteen Tse-Kesi* litigation (R. 77):[1]

> "Q. Now, that action did come before this court and you were aware of that, weren't you, Dale?
>
> "A. Yes, I was.
>
> "Q. And you knew what action this court took in this case, did you not?
>
> "A. Yes.
>
> . . . . . .
>
> "Q. You had not gotten the horses eliminated by the case you had brought in this court, had you?
>
> "A. No.
>
> . . . . . .
>
> "Q. So you decided that was too slow, that you would take the matter into your own hands and get rid of these horses?
>
> "A. We decided to put the abandoned horse program into effect, yes."

At this point the trial judge asked questions designed to elicit whether the witness had been aware of the pend-

[1] 93 F.Supp. 745 (D. Utah), reversed 191 F.2d 518 (C.A. 10).

ing litigation when he commenced the destruction of petitioners' horses (R. 77). Kinnaman answered several of the judge's questions evasively (R. 77-78). Then (R. 78):

"Q. And you went ahead, regardless of the proceeding here; is that right?

"A. Yes, I went ahead, thinking I knew the status of the land at that time, that I was acquainted with the proper ownership of the land at that time."

This caused the trial judge to remark concerning the section of the criminal code about obstructing justice (R. 78).

It shortly developed that Kinnaman continued with the very depredations of which complaint was made after this suit was filed and while the trial was in progress (R. 82, 84):

[R. 82] "Q. You mean you went right on killing the horses even after this case was filed with which we are here concerned?

"A. I don't recall that we killed any horses, no.

"Q. Did you ship any?

"A. Yes

"Q. You had them destroyed in the same way, then —is that true?

"A. Yes, there were some that were shipped.

[R. 84] "Q. Any horses you find there yet you are continuing to destroy?

"A. Yes."

It was at this juncture that the trial judge requested counsel for the petitioners to prepare a temporary restraining order, saying (R. 84):

"The Court: That litigation was pending here at the time these fellows took this matter into their own hands. You have a very serious situation, not just with respect to whether they recover damages; I am talking about an indictment. I am talking about contempt of this court. I am talking about obstructing justice by people who are parties plaintiff to the litigation in this court—the Bureau of Land Management, taking the matter into their own hands, going out and destroying property belonging to the defendants; to a proceeding in this court which was not disposed of, which was pending here."

It is to be noted that every one of the alleged instances of bias on the part of the trial judge which are cited in the Government's brief (U.S. Br. 16-18) followed the disclosure (R. 77-78) that Kinnaman had, during the pendency of the earlier litigation, proceeded to reach the desired result in a shorter, if less legal way. And most of the other instances cited by the Government as reflecting bias on the part of the judge followed his comments as to the lack of credibility and the evasiveness of the Government agents whom he had observed on the stand (R. 80, 104, 108-109, 160, 171, 220).

The Government says (U.S. Br. 16):

"* * * the District Court read into every step of the elimination program a calculated, vicious plot to 'destroy the ability, if not the will of plaintiffs, to further inhabit this range' (R. 45). Commencing the case with that conviction (R. 87-88, 89, 100), the court conducted the trial in a manner hostile and prejudicial to the Government's case and demonstrably allowed inferences from its conviction, rather than from all the facts, to determine its findings."

The very citations relied on demonstrate the utter lack of foundation of the accusation; they establish that the court formed its conviction after hearing the testimony of the evasive and reluctant witness who was the prime mover in the program of depredation. That the judge's conviction became stronger as more testimony was heard proves not that the judge's conduct was prejudicial or unjudicial, but that the trial judge became increasingly indignant as he learned the full enormity of what the Government agents had done.

C. There are indications in the Government's attack against the trial judge which seek to imply that his views at the present trial were foreshadowed by his opinion in the *Hosteen Tse-Kesi* case, *supra*, page 2, note 1 (U.S. Br. 16, n. 3). But if the United States Attorney believed that the opinion previously expressed was indication of improper prejudice, the provision for disqualification (28 U.S.C. § 144) afforded an ample remedy. Certainly present-day prosecutors have not been squeamish in invoking that section. Cf. *United States* v. *Lattimore*, 125 F. Supp. 295 (D.D.C.). And never until now, so far as we are aware, has the Government substituted, for its failure to make timely use of 28 U.S.C. §144, an appellate assault upon the trial court's impartiality.

D. The Government fails to show error in any specific finding except for the immaterial matter noted below, p. 6, of a horse's leg having been shot off instead of sawed off. Otherwise, it fails utterly to show that in any instance Government trial counsel made any offer of proof where complaint is now made of the curtailment of examination of Government witnesses (U.S. Br. 17, 58-59, 61). All that the Government's objection comes to, therefore, is a general pique because the trial judge expressed resentment and indignation over the outrageous conduct of the Government's agents.

The one finding that can be shown wrong in any particular is that sentence in Fdg. 25, R. 35, which states that Black, a Government agent, sawed off the protruding leg of one of petitioners' horses. The testimony shows that, in fact, Black shot off this horse's foot (R. 301).

This minor variance[2] is hardly helpful in any of the controlling issues in the case and only adds to the grisly brutality of the scene described by Black (R. 301). The Governments asserts (U.S. Br. 16, n. 4) that it is "typical of the court's attitude and accuracy" but fails to point out any portion of any other finding that is deficient in evidentiary support.[3]

E. It must be borne in mind that, in order to set aside findings of fact made by a trial judge who heard the witnesses and observed their demeanor, "the reviewing court on the entire evidence" must be "left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364, 395. Such a conviction is easier to come by when, as in the *Gypsum* case, the oral testimony adduced by leading questions is in conflict with contemporaneous documents. But where the findings, as here, reflect an evaluation of contradictory oral testimony given by witnesses, untrammelled by documents, the "tone of voice or the gloss that personality puts upon speech" (*Von Moltke* v. *Gillies*, 332 U.S. 708, 730) becomes vital, and any finding supported by evidence is impregnable to assault. As the Second Circuit recently said *per curiam*:

> "The words that a witness utters, although they must of course be the vehicle of whatever he has to contrib-

[2] Probably resulting from the dictator's "shot off" becoming the transcriber's "sawed off."

[3] We deal below, pp. 14-15, with the Government's contention that the circumstance that the trial judge disbelieved the Government's witnesses as to value renders his award of damages excessive.

nte, are again and again of no probative weight at all because of his address, his bearing and his apparent lack of intelligence."[4]

It is significant that the Court of Appeals in the present case did not set aside the findings, which, being explicit and factual, are wholly different from the conclusory findings of mixed fact and law as to "negligence" that were held not binding on appeal in *Dalehite* v. *United States*, 346 U.S. 15, 24, n. 8.

F. Except as to the barbarous detail of whether Government agent Black sawed off or shot off one horse's leg, the Government has not established the lack of foundation for any part of any finding. The Government has further failed to point to a single ruling made by the trial judge that was erroneous and in respect of which the United States Attorney properly preserved his record. And the Government has pointedly failed to disclose to this Court that the trial judge's justifiable and outspoken indignation over the shocking depredations committed upon non-English-speaking Indian wards of the United States did not precede but followed the unfolding of the evidence and the evasive testimony of the very Government agent who was responsible for the torts now in issue, and so represented not a pre-judgment but rather the considered after-judgment of an experienced United States District Judge.

For the rest, the Government's strictures reflect simply disagreement with that judge's appraisal of the legal effects of its agent's conduct. To those we turn; but we cannot forbear to express shock that the law officers of the Gov-

[4] *Purcell* v. *Waterman Steamship Corporation*, 221 F.2d 953, 954. The style of the opinion strongly suggests that it was written by the senior judge hearing the appeal, L. Hand, J., who added: "Conceivably, the day may come when appeals will be heard upon a completely faithful reproduction of the whole scene as it was in the court room. Absit omen; but at least until that horrid fate shall overtake our devoted successors, we shall continue to carry on as we have."

ernment should have deemed it part of their duty to make upon a member of the bench the kind of attack now presented to this Court in this case.

II. The Present Case Clearly Falls Within the Coverage of the Tort Claims Act

The Government seeks to impale petitioners on the horns of the following dilemma (U.S. Br. 45-47):

> Either the acts of Kinnaman et al. were authorized and within the scope of their authority, in which event the Government contends it is immune from liability under the exception for governmental functions in 28 U.S.C. § 2680 (a), or else those acts were unlawful and therefore unauthorized, and in consequence not done within the scope of the agent's employment (28 U.S.C. § 2671), again with immunity from liability.
>
> In other words, the Government says, regardless of the legality or otherwise of what these agents did, no purposeful act on their part can fasten liability on the United States, and these petitioners, Indian wards of the United States, must go uncompensated.

This is another example of the Government's efforts to show "that Congress intended to draw distinctions so fine-spun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Company* v. *United States*, 50 U.S. 61, 68. A moment's consideration will suffice to demonstrate the unsoundness of the Government's position.

First. By solemn concession, made at the trial, the United States Attorney admitted the authority of the Government agents in this case (R. 64): "* * * we would like to indicate that we have no desire to deny this authority to do, as the agent of the government, of the Bureau of Land Management, what he did—what they actually did in this

case." We think that this concession cannot now be successfully challenged and that it is therefore not open to the Government to urge that the acts of its agents here in issue were outside the scope of their employment.

Second. The Government says (U.S. Br. 46-47) that petitioners are unable to make "a showing, essential to their case, how the very action these Government agents were authorized to take could be tortious, i.e., 'negligent or wrongful' within the Tort Claims Act."

A short answer to this effort to cut the heart out of the Tort Claims Act is that trespasses are compensable equally with negligent acts so long as they are within the scope of the Government agent's authority. True, "wrongful" does not impose absolute liability. *Dalehite* v. *United States*, 346 U.S. 15. But the opinion in that case shows that the word "wrongful" was added to the statute precisely because it was desired to make the United States liable for its agents' trespasses. The Court said (346 U.S. at 45):

> Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: "trespasses" which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong. 3d Sess. 43-44. * * *

Very plainly, the Tort Claims Act's coverage is not limited to the torts committed by careless jeep drivers or

forgetful surgeons. It is not a statute simply setting up a negligence practice on the non-jury side of the court. It covers trespasses as well.

Third. It is plain on the very basis of the Government's own arguments and Utah citations (U. S. Br. 55) that the conditions for liability on the part of the Government for acts done by its agents have been met. The principal is liable for the willful act of his agent that is committed in the scope of his employment and (a) in furtherance of his employer's interests, or (b) if the use of force could be contemplated in its accomplishment.

Here, scope of employment was admitted at the trial (R. 64); the Government argues at length that it was necessary to round up petitioner's horses and burros to regulate the range, i.e., that the round-up furthered Government interest; and obviously such animals cannot be rounded up without some use of force. Therefore, on the Government's own theory (U. S. Br. 55), all of the factors necessary to hold it liable are present in this case.

Fourth. Apart from the basic fallacy of supposing that the Tort Claims Act does not cover trespasses, the Government's argument is also unsound in failing to distinguish between acts that are authorized and those that are justified. A Government agent's act which is unauthorized cannot render the United States liable. An act that is authorized and that can be justified similarly does not render the United States liable; it is not tortious. That, we submit, is the true rationale of the exception for governmental functions. But an act that is authorized and that cannot be justified, i.e., a tort within the scope of the Government agent's authority, does entail liability. That is the situation in this case.

We think it clear that Congress did not intend to leave these Indian petitioners—or, for that matter, any other persons similarly aggrieved—remediless against trespasses

committed by Government agents within the scope of their authority but which cannot in any sound view be justified.

III. The Utah Abandoned Horse Statute Cannot Justify the Trespasses Committed by the Government's Agents

Petitioners do not propose to reargue every point contained in their opening brief. But they believe the Court will be assisted in its consideration of the present case if attention is drawn to some of the more obvious omissions, legal errors and factual misstatements that interlard the Government's brief.

A. *The Taylor Grazing Act occupied the field.*

The Government in this case is in the strange and antinational position of asserting that an Act of Congress designed to regulate grazing on the public domain does not fully occupy the field but instead leaves full play for the operation of an antecedent state statute whose provisions conflict with those of the Congressional enactment.

The clearest instance of the conflict is that, whereas the Taylor Act and the Federal Range Code provide for written notice served in person or by registered mail, the Utah statute provides only for notice by publication (Pet. Br. 16-17).

The Government's attempt to argue that the Range Code was inapplicable (U. S. Br. 26-27) fails on the basis of the very record references cited at those pages: The purpose—the obvious purpose—of the notice required by the Range Code was to give notice to the persons owning animals in the area sought to be cleared. About eight Indian families were affected. The Government's agents knew that the animals they were rounding up for destruction belonged to these Indians (U. S. Br. 26). And we may properly use as an admission against interest on this point the testimony of the otherwise unreliable witness Black (R.

171, 269, 404, 414) that he so far knew the owners of the horses that he gave them oral notice naming them (R. 133, quoted at U. S. Br. 34).

If oral notice could be given, then the written notice required by 43 CFR § 161.11 (Pet. Br. 54) could also have been given, and it is simply fatuous to argue (U. S. Br. 27) that compliance with those written notice provisions "would render elimination from the Federal range of abandoned animals difficult if not impossible as a practical matter in cases, like this, where the officials do not know the specific owners of the individual animals."

Moreover, nothing in the notice provision of the Federal Range Code (43 CFR § 161.11; Pet. Br. 54) requires that personal notice be that specific. It may be significant that the Government so far deems the exact terms of this provision unimportant that it is nowhere set out in the brief of the United States. But it is only by ignoring completely the terms of the state and federal notice provisions, as did the court below, that one can construct an argument that the two do not conflict.

B. *The provisions of the Utah abandoned horse statute were not followed.*

Seeking to sustain the obviously invalid proceedings under color of the Utah abandoned horse statute which its agents invoked to justify their destruction of petitioners' animals, the Government relies on the presumption of regularity of official acts (U. S. Br. 31, 41).

That reliance is misplaced. The testimony, set forth in detail at Pet. Br. 6-7, 26-31, shows that the official acts relied upon were irregular. Thus, the presumption is completely rebutted. Apart from this, there were no proceedings to which the presumption could attach. The Government argues that the round-up resolution was properly adopted at the July 1 meeting. But the minutes of that

meeting say nothing about the adoption of such a resolution and fail to show any discussion concerning its subject matter (U. S. Br. 32-33). The question for the district court was whether any proceedings concerning a round-up resolution took place on July 1. On conflicting oral testimony he found there were none (see Pet. Br. 6-7, 27). Accordingly, there was no occasion to indulge in the presumption of regularity.

To the extent that the matter could by way of assumption *arguendo* be deemed doubtful, it must be resolved in petitioners' favor by the rule that statutes like the one in question, which provide for summary proceedings, must be construed strictly (Pet. Br. 24-26). That rule is pointedly ignored by the Government.

C. *The notice given was patently inadequate.*

Petitioners urged (Pet. Br. 34-39) that the publication and posting of notices in English, where illiterate and non-English speaking Indians were sought to be affected, is so patently inadequate as to involve a denial of due process of law; and in support of the foregoing proposition cited, discussed, and relied upon a quite recent decision of this Court which considered the constitutional adequacy of notice of publication. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

The Government makes the anamolous argument that they did not know who owned the horses and that, in any event, petitioners had actual oral notice of the impending round up from Dee Black. This was the very same Dee Black whose credibility and attitude unfavorably impressed the trier of facts (R. 171, 269, 404, 414). He was finally expelled from the courtroom for laughing during the efforts of counsel for petitioners to elicit facts from an evasive and hostile witness, Leland Redd (R. 404). It was this man and another member of the Redd family to whom the Gov-

ernment awarded the grazing land from which its agents had driven petitioner Sakezzie (R. 122).

The Government has assailed the impartiality of the trial judge (U.S. Br. 14-20). Unless it is now to be the law that a disbelieved witness can be testimonially rehabilitated by a litigant's attack on the judge, the Government has failed to establish that, in fact, petitioners had notice of the horse-slaughter program.

So far as the law is concerned, petitioners are content to rest on the *Mullane* case—which is not even cited by the Government in over fifty printed pages of argument.

IV. The Damages Awarded Were Compensatory and Not Punitive

By way of preliminary on the issue of damages, petitioners desire to call attention to the circumstance that, while the Government states (U.S. Br. 6) that a total of $1,700 was received for petitioner's slaughtered animals, it does not disclose until thirty pages later (U.S. Br. 36) that no part of that sum was paid these petitioners. Instead (id.) all the proceeds went to the Advisory Board.

The Government also states (U.S. Br. 6): "Several [of the horses] were redeemed by Indians," citing R. 89, 144, 299. The first two references are to horses redeemed by Ute Indians (*accord*, R. 117). Petitioners, however, are Navajos, and this entire record establishes that a single Navajo horse, was released to an unidentified boy referred to as a Navajo (R. 299). Yet, the Government has no compunction in assailing the judicial integrity of the trial judge because he found that there was a concerted scheme directed at the present Navajo petitioners (U.S. Br. 16, 31, 35, 36, 42).

The Government's attack upon the award of damages (U.S. Br. 57-63) is premised primarily on the circumstance

that the trial judge disregarded the testimony of Government witnesses as to value and curtailed their examination.

As to the second point, if the United States Attorney had considered the trial judge's exclusionary rulings erroneously prejudicial, he would—and should—have made appropriate offers of proof. It matters not whether trial counsel was satisfied with the court's rulings or simply failed to protect his record at the trial. In either event his colleagues have no basis for complaint at the appellate level.

The conclusive answer to the balance of the Government's arguments as to value is that they fail to give any weight whatsoever to the circumstances that Navajo horses are specially trained, that they have have a unique place in the economy of their owners, and that they are in consequence not readily replaceable (Fdg. 9, R. 24-25; Edgs. 15-16, R. 27-28).

To recur to the familiar law school example of the race horse, the dray horse, and the saw horse, the vice in the Government's argument is that it attacks the award of damages as excessive because the trial judge did not award dray horse damages for the destruction of uniquely valuable race horses.

We do not contend for a moment that petitioners' animals were thoroughbreds in the Man of War, Citation or Nashua brackets, but neither can those horses understand Navajo commands. We do say that petitioners' horses were sufficiently unique that their destruction is not compensated by the market value of biologically similar animals that had not been bred to the country, trained in Navajo ways, or accustomed to Navajo commands.

For the rest, as we have already pointed out (Pet. Br. 42-45), the judgment rests on the findings, which in turn are supported by the evidence, and the items of damage included in that judgment were proper under the Federal Tort Claims Act.

The Government's remaining points do not call for further argument on our part.

Conclusion

For the foregoing additional reasons, the judgment below should be reversed.

Respectfully submitted,

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